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No. 00-422

IN THE

Supreme Court of the United States

NATIONAL WHISTLEBLOWER CENTER,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondents' contention that the critical issues presented in this petition are not justiciable is completely without merit. This case squarely raises an extremely important federal question that this Court should resolve.

Respondents' contentions are baseless and without merit, for several reasons. First, the Respondents are simply wrong in their argument that the questions presented here were not a part of this case below. The very key questions here, *i.e.*, whether the Administrative Procedure Act, 5 U.S.C. §§ 551-558 governs the Nuclear Regulatory Commission's ("NRC's") conduct of adjudicatory proceedings, and whether the NRC is free to adopt interpretations of its regulations that cause its procedures to fall below the safeguards set forth therein, are very squarely before this Court.

Second, the Respondents fail to recognize the "concerns" that guided the Court's grant of *certiorari* in *Vermont Yankee Nuclear Power Corp. v. N.R.D.C.*, 435 U.S. 519, 525, 98 S.Ct. 1197, 1202 (1978). Because the same types of concerns are present here, the Court should grant *certiorari* and review the Court of Appeals' decision in this case.

Third, the NRC's holding below, that the Administrative Procedure Act's rules governing adjudications are inapplicable to nuclear safety proceedings, will perpetuate harm to the public's ability to participate in scores of nuclear power plant license renewal proceedings in the future.

ARGUMENT

Petitioner raised the questions presented in this case below. In the administrative proceeding before the NRC, as well as in both rounds of briefing and argument before the Court of Appeals, a central argument raised by Whistleblowers centered on the NRC's failure to follow 5 U.S.C. § 554 and how that failure prejudiced the public's right to meaningfully participate in NRC safety proceedings. When Respondent Calvert Cliffs suggests to the Court that the questions presented here were not presented below, it is wrong.

On August 19, 1998, the NRC's "Commission" issued an order in the administrative proceeding below in which it referred Whistleblowers' intervention petition to an Atomic Safety and Licensing Board Panel ("ASLB") for adjudication. *See* App. 115a. In its order, the NRC Commission directed the ASLB to, *inter alia*, grant extensions of time only upon a showing of "unavoidable and extreme" circumstances and to establish a timetable for adjudication with rigid time parameters and which did not truly allow for the unique and extensive scientific and public health and safety questions that were likely to arise. App. 36a.

Upon notice of the Commission's order, Whistleblowers immediately objected to this direction on the grounds that it violated, *inter alia*, the Administrative Procedure Act, 5 U.S.C. § 554. App. 105a. Whistleblowers primarily relied on 5 U.S.C. § 554(b)(3), which requires agencies in formal adjudications to give due regard for the conveniences or necessities of the parties or their representatives in fixing the time and place of a hearing. App. 126a.

Whistleblowers made the point that where, as here, the agency was dealing with the very first license renewal proceeding of its kind, it was manifestly unreasonable to believe that the public could meaningfully participate without APA-type safeguards in place to allow for searching and reasoned review of the complex scientific and technical documents at issue.[1/]

Whistleblowers raised this objection throughout the proceeding below, and the Commission ultimately dismissed that aspect of Whistleblowers' argument as it affirmed the ASLB's denial of Whistleblowers' petition to intervene. App. 60a-61a, n. 4. Whistleblowers then specifically raised the question of the APA's applicability to NRC licensing proceedings and whether the NRC's "unavoidable and extreme" circumstances test comports with the APA's

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[1/] Respondent Calvert Cliffs Nuclear Power Plant ("Calvert Cliffs") suggests that Whistleblowers got "all of the procedural protections of the APA and more." *See* Brief in Opposition For Respondent Calvert Cliffs, p. 11. However, as the record clearly demonstrates, Whistleblowers never received meaningful consideration of their request for a reasonable time to allow its experts to study the license renewal application in question. Specifically, it is uncontested that under the prior rules applicable to nuclear safety proceedings, Whistleblowers would have obtained an enlargement of time to obtain proper expert advise. App. 35a-36a. The "starter's pistol" argument, *i.e.*, that Whistleblowers could have begun preparing at the very moment the license application became publicly available, *see, e.g. id.* at 2, n. 3; Brief For the Federal Respondents in Opposition, at 16-17, is unavailing and ignores the fact that under the prior APA-consistent regulations, the "starter's pistol" argument would have failed. *Id.*, App. 35a-36a.

requirements to the Court of Appeals. For example, on June 14, 1999 Whistleblowers filed their main "Brief" before the Court of Appeals. That brief contained an entire section dedicated to the harm caused to Whistleblowers as a result of the NRC's failure to follow the APA adjudicatory rules. In part, Whistleblowers stated as follows to the Court of Appeals:

> The Commission . . . erroneously held that the APA was not fully applicable to the Calvert Cliffs proceeding. Even assuming that the Commission was not bound by its published regulations, the Commission was not vested with unlimited "broad regulatory latitude" to establish its "own rules of procedure." The Commission was required to adhere to the adjudicatory requirements of the APA when it evaluated each and every procedural request filed by the [National Whistleblower] Center. The NRC's failure to carefully analyze its rulings pursuant to the APA mandates that this case be remanded in order for the Commission to re-evaluate its procedural rulings in light of the APA's requirements.

Petitioner's Brief to the U.S. Court of Appeals for the D.C. Circuit, pp. 40-41 (June 14, 1999).

Even when requested to re-brief some issues by the D.C. Circuit, Whistleblowers still raised their APA argument:

> A critical, yet unobtrusive measure that agencies must provide when conducting hearings on the record is that "in fixing the time and place for hearings, due regard shall be had

> for the convenience and necessity of the parties or their representatives." 5 U.S.C. § 554(b)(3). Thus, regardless of whether the Commission was applying substantive or procedural rules...the NRC was statutorily mandated to take into consideration the "necessities and conveniences" of Whistleblower when ruling on the timing issues. *This statutory rule limits the* discretion of all agencies to apply prejudicial procedural rules . . . .

Petitioner's Supplemental Brief filed before the Court of Appeals for the D.C. Circuit, p. 19 (January 21, 2000).

On November 12, 1999, the Court of Appeals issued its first decision in this matter, which was in Whistleblowers' favor. In her majority opinion, Judge Wald did not reach the APA issue presented in this petition. Instead, she ordered the NRC to adhere to its long-standing "good cause" test which was *consistent* with the standards set forth in 5 U.S.C. § 554. Judge Wald held that the NRC's swerve, from a "good cause" to an "unavoidable and extreme circumstances" test, was impermissible because it deviated from long-established precedent. App. 46a. Accordingly, under Judge Wald's opinion, the NRC was required to provide applicants for intervention, such as Whistleblowers, procedures in line with its published regulations, which meet the APA's protections.[2/]

[2/] The Court may consider whether a totally unjustified departure from well-settled NRC procedures of long standing might "require judicial correction." *Vermont Yankee*, 435 U.S. at 542, n. 17, 98 S.Ct. at 1211, n. 17. Though the issue was not squarely before the Court in *Vermont Yankee*, the Court (continued...)

Specifically, in a prior case, Judge Wald noted that the NRC's published regulations were consistent with the APA rules on adjudications. *Union of Concerned Scientists v. N.R.C.*, 735 F.2d 1437, 1444, n. 12 (D.C. Cir. 1984).

In one sense, Respondents are partially correct. They argue that the NRC's "Subpart G" procedures exceed the APA's requirements, and that the "full panoply" of those procedures are extended to licensing procedures. Brief in Opposition for Respondent Calvert Cliffs, p. 11. This case illuminates the practical problem with that argument, which will now be repeated in all future licensing cases. To wit, those "Subpart G" rules that Respondents rely upon expressly call for extensions of time where "good cause" merits. That standard unquestionably meets the APA's requirements on its face.

The problem, then, is not that the NRC's regulations violate the APA, which is what the Respondents would have this Court believe the Whistleblowers are arguing. Whistlebowers are not. Rather, the problem is that when the NRC swerved from its published regulations and imposed the "unavoidable and extreme circumstances" test it facially violated its own regulations, thus causing it to dip below the statutory minima required by the APA. This standard, notwithstanding the NRC's published procedures, unquestionably fails to meet the APA's requirements. Moreover, the lower courts holding that the NRC did not have to provide notice and comment regarding revisions to their

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[2/](...continued)
indicated that such review might be proper under appropriate circumstances. On the record here, the Court could fairly conclude that this question is included within the questions presented by Whistleblowers.

published procedural regulations fails to address the critical issue raised in this petition.

The wrinkle in this case occurred on November 22, 1999, when, after Judge Wald had left the Court of Appeals, the remaining two judges vacated her Order *sua sponte* and scheduled the case for re-argument. App. 21a. Thereupon, the Court of Appeals never again addressed or resolved the question of APA applicability, though Whistleblowers again raised it. Instead the Court veered off onto an excursion through whether the "unavoidable and extreme circumstances" test was a "procedural" or "substantive" rule. *Id.*

Therefore, the questions presented here, raised and argued by Whistleblowers throughout the proceedings below, are squarely before this Court.

In *Vermont Yankee*, this Court granted *certiorari* where the Court of Appeals erroneously required the NRC to give procedures above and beyond those required by the APA, "because of our concern that they had seriously misread or misapplied this statutory and decisional law cautioning reviewing courts" against holding federal agencies to higher standards than the APA requires. *See Vermont Yankee*, 435 U.S. at 525, 98 S.Ct. at 1202.[3/]

[3/] That *Vermont Yankee* is a rulemaking case is irrelevant at this stage of this adjudication case where the question is whether *certiorari* review is proper. Moreover, the outcome of *Vermont Yankee*, where the adequacy of agency procedures was at issue, does not suggest a similar outcome here, because the *Vermont Yankee* court made the point that adjudications, which are at issue here, are normally associated with the "full

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The very same principles are at stake here. First, the "unavoidable and extreme circumstances" test in question will unquestionably apply to all future license renewal application proceedings. *See* 63 Fed. Reg. 41,872 (1998). Without question, these license renewal proceedings constitute the most important safety proceedings pending before the agency, and will have direct impact on the public's right to adjudicate major safety issues at nuclear power plants throughout the United States.

This Court has noted the public interest in nuclear safety. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 279, 104 S.Ct. 615, 637 (1984) (mentioning public interest in nuclear safety); *Con-Edison of New York, Inc. v. PSC of New York*, 447 U.S. 530, 100 S.Ct. 2326 (1980) (same). *See also* 42 U.S.C. § 2011 (declaring the regulation of nuclear power to be in the public interest). This Court has also noted the importance of ensuring that nuclear safety proceedings adhere to the requirements of the APA. *Vermont Yankee*, 435 U.S. 519 (1978).

Just as the Court in *Vermont Yankee* reviewed the Court of Appeals decision in order to protect the NRC from the Court of Appeals, and not allow the Court of Appeals to "engraft upon it" procedures above and beyond the APA's requirements, the Court should now act here. Where the Court of Appeals has failed to ensure that the NRC's procedures do not fall below the floor established by the APA, thus presenting the flip side of the *Vermont Yankee* coin, this Court should step in to protect the public's interest.

[3/](...continued)
panoply" of procedural devices. *Vermont Yankee*, 435 U.S. at 437, 98 S.Ct. at 1213.

Significantly, this case will specifically affect the public participation in nuclear plant license renewal cases, because "operators of plants around the country are watching the Calvert Cliffs case." Cert. Petition at 17, *citing* Layton, "Nuclear Plants Watching Calvert Cliffs License Bid," *The Washington Post*, p. 1A (April 1, 1999). In fact, the NRC's "unavoidable and extreme circumstances" test, first used in this case, has already been used in at least one other license renewal case where potential intervenors could not formulate contentions in time and were turned away, *see In the Matter of Duke Energy Corporation*, Memorandum and Order (LBP-98-33), ASLBP Dec. 29, 1998, and no group of intervenors has been successful to-date in formulating contentions and reaching the hearing stage in any of the license renewal proceedings that have occurred.

Moreover, the Respondents argue that there is no split among the circuits to justify review. Even if this Court agrees with Respondents that there is not a circuit split, it should find that this case squarely falls into the category of cases in which *certiorari* is permissible pursuant to Supreme Court Rule 10(c). Likewise, this case arises from the D.C. Circuit, which rules upon an overwhelming number of administrative law and NRC cases, and is clearly the leader among the federal circuits in this area. *See, e.g., Stone v. I.N.S.*, 514 U.S. 386, 404, 115 S.Ct. 1537, 1548 (1995) (calling D.C. Circuit the circuit with the "most experience" reviewing agency decisions). Correction of erroneous opinions of the D.C. Circuit is, therefore, on a par with correcting inter-circuit conflicts which have the potential to affect a large number of interested parties.

This Court granted *certiorari* in *Vermont Yankee* in order to correct the D.C. Circuit where its leadership among the circuits threatened to create a precedent which would interfere

with agencies' ability to function efficiently. Doing so was fully within the Court's discretion, and was fully consonant with Supreme Court Rule 10(c). This Court should do the same here where the D.C. Circuit's leadership threatens the ability of the public to participate in a meaningful way in proceedings involving important questions of public safety.

CONCLUSION

For the foregoing reasons, this Court should grant the Whistleblowers' Petition for *Certiorari* in order to finally resolve whether the APA applies to adjudications brought under the Atomic Energy Act.

Respectfully submitted,

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